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IN THE

Supreme Court of the United States

October Term, 1963

No. 470

JOHN CLAY, *Petitioner*,

v.

SUN INSURANCE OFFICE, LIMITED, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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HORTENSE MOUND,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

The Opinion of the Court Below and Prior Opinions in This Case

1. The judgment sought to be reviewed herein was entered by the Court of Appeals for the Fifth Circuit on June 19, 1963. The Court's opinion, *Sun Ins. Office, Ltd.* v. *Clay*, 319 F. 2d 505, is reprinted in Appendix C of the Petition, pp. A1-A14.

2. The prior opinions in this case are as follows:

(a) Opinion of the United States Court of Appeals for the Fifth Circuit, dated April 8, 1959, *Sun Ins. Office, Ltd.* v. *Clay*, 265 F. 2d 522, which is reprinted in Appendix E of the Petition, pp. A17-A27.

(b) Opinion of the United States Supreme Court dated June 13, 1960, *Clay* v. *Sun Ins. Office, Ltd.*, 363 U. S. 207.

(c) Opinion of the Supreme Court of Florida, dated October 18, 1961, *Sun Ins. Office, Ltd.* v. *Clay*, 133 So. 2d 735.

The Question Presented for Review

Where an insurer, in Illinois, issues and delivers to a resident of Illinois a personal property floater insurance policy containing a suit clause limiting the time to sue which is legal under the law of Illinois and thereafter the assured changes his residence to Florida where he sustains a loss under the policy, may the insurer under the Constitution be deprived of its defense based on the suit clause by the application of a Florida statute which prohibits such limitations in general terms not specifically applicable to foreign contracts of insurance?

Constitutional Provisions and Statutes Involved

1. The provisions of the United States Constitution involved in this case are as follows:

(a) The due process clause of the Fourteenth Amendment which provides:

> "* * * nor shall any State deprive any person of life, liberty or property, without due process of law; * * *."

(b) Article 1, Section 10, which provides:

> "No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *."

(c) Article IV, Section 1, which provides:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State * * *."

2. The Florida statute involved is Fla. Stat., § 95.03 (1957), which is set forth in Appendix A of the Petition, p. A1.

Statement of the Case *

The text of the clause which is sought to be invalidated reads as follows:

> "Suit Clause: No suit, action or proceeding for the recovery of any claim under this Policy shall be sustainable in any court of law or equity unless the same be commenced within twelve (12) months next after discovery by the Assured of the occurrence which gives rise to the claim. Provided, however, that if by the laws of the state *within which this Policy is issued* such limitation is invalid, then any such claims shall be void unless such action, suit or proceeding be commenced within the shortest limit of time permitted by the laws of such state to be fixed herein." (Pl. Ex. 1, R. 10) (Emphasis added.)

The facts material to the constitutional issue, which is the sole issue presented in this case, are as follows:

The Respondent, a British company doing business in various States, including Illinois and Florida (Pl. Ex. 1, R. 13) issued a policy of insurance to Petitioner on April 22, 1952 for a term of three years through its local Illinois agents. When the policy was issued, the Assured was a citizen of Illinois, and the policy specified the address in Chicago, Illinois where he resided (Pl. Ex. 1, R. 8). The entire premium for the full term of the policy was paid in Chicago (R. 60). Furs, jewelry and paintings covered by the policy were appraised by Chicago dealers (Pl. Ex. 1, R. 11, 12). The policy in bold type is designated as an Illinois form of policy covering risks on personal property throughout the world as follows:

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* Record references are to the Transcript of Record, United States Court of Appeals for the Fifth Circuit.

ILLINOIS
PERSONAL PROPERTY FLOATER POLICY
(World Wide).

A personal property floater is an inland marine policy governed by the Illinois Insurance Code, Ill. Rev. Stat., ch. 73, § 616, Class 3(d) (1957). The form of the policy, as well as the rate to be applied, must be filed with and approved by the Director of Insurance of Illinois (Ill. Rev. Stat., ch. 73, §§ 755(2), 1065.22 (1957)) and no company may issue a policy or charge a rate therefor except in accord with such approved filings under penalty of law (Ill. Rev. Stat., ch. 73, §§ 1065.23, 1065.34 (1957)). The Illinois form issued to the Assured herein contained the one year limitation clause set forth above.

Some time after the policy was issued, the Assured changed his residence to Florida where the losses claimed thereunder occurred in the latter part of December, 1954 and in January, 1955. Petitioner notified Respondent of the loss on February 1, 1955 (R. 54). Respondent denied liability on April 6, 1955 (R. 55). Suit on the policy was instituted in the United States District Court for the Southern District of Florida on May 20, 1957 (R. 2) more than two years after discovery of the losses.

The defense asserted by Respondent which is material to the issue presented here was as follows:

> That the policy sued on provides that no suit for the recovery of any claim shall be sustainable unless commenced within twelve months next after discovery by the assured of the occurrence which gives rise to the claim, and that plaintiff's suit on May 20, 1957, was brought approximately two years and four months after he had full knowledge of his loss.

Petitioner's suit in the District Court was tried before a jury which found for Petitioner in the amount of $6,800 (R. 14), and judgment was entered for that sum (R. 14-15). Respondent moved for judgment *non obstante veredicto* based, *inter alia*, on its defense under the twelve month suit

clause. This motion was denied by the District Court without opinion, apparently on the basis that Fla. Stat., § 95.03 rendered the clause void. On appeal to the United States Court of Appeals for the Fifth Circuit, the judgment of the District Court was reversed and judgment was entered in favor of Respondent on April 8, 1959 (*Sun Ins. Office, Ltd.* v. *Clay*, 265 F. 2d 522). The Court of Appeals held that it would not undertake the "difficult guess" as to whether under the law of Florida, Section 95.03 applied to the foreign contract of insurance since even if the Florida invalidating statute were held to apply, such application would be invalid under the Fourteenth Amendment as a deprivation of Respondent's property rights. In view of its holding of unconstitutionality which barred a recovery by the assured in any event, the court also refrained from passing on another question of state law relating to the coverage of the policy where a loss is caused by the deliberate act of the assured's wife then residing with him.

Certiorari was granted by the Court (361 U. S. 874 (1959)), and, on June 13, 1960, the Court rendered its decision, *Clay* v. *Sun Ins. Office, Ltd.*, 363 U. S. 207, holding that the question of the applicability, under Florida law, of Section 95.03 to the contract in issue, as well as the question of policy coverage, should have been settled before the constitutional question was reached. Accordingly, the decision of the Court of Appeals was vacated and the case was remanded with directions that all questions of Florida law be certified to the Supreme Court of Florida for determination by that court pursuant to Fla. Stat., § 25.031 (1957). By opinion, filed October 18, 1961, *Sun Ins. Office, Ltd.* v. *Clay*, 133 So. 2d 735, the Supreme Court of Florida in answer to the questions of Florida law which were presented to it pursuant to the mandate of the Court, declared that there was coverage under the policy and that under Florida law, Section 95.03 was applicable to the Illinois contract of insurance involved in this case.

All questions of state law having been determined in obedience to the Court's mandate, the United States Court of Appeals, after receiving briefs and hearing argument, again rendered an opinion on the constitutional issue in favor of Respondent. This opinion, dated June 19, 1963, *Sun Ins. Office, Ltd.* v. *Clay,* 319 F. 2d 505, held that under the due process clause of the Constitution, the contacts of Florida were insufficient to justify the deprivation of Respondent's defense based on the Illinois contract.

ARGUMENT

The Court should not exercise its discretion in favor of granting this petition for a writ of certiorari for the reasons which follow.

POINT I

The decision below is no longer premature.

The Court, in its former opinion in this case, (363 U. S. 207 (1960)) remanded the case with the mandate that all other questions be disposed of prior to a decision on the constitutional issue. The mandate has now been carried out and the decision below on the constitutional issue is no longer subject to attack on the ground that it is premature.

POINT II

The decision below is legally correct and is in full accord with applicable decisions of the Court.

The determination of the United States Court of Appeals is based on the correct principle of law and its correct application to the facts in issue. The holding of that court is as follows:

(a) The presence of "significant" contacts is the determinant of constitutional due process. *Watson* v. *Employers*

Liability Assur. Corp., 348 U. S. 66 (1954); *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143 (1934); *Home Ins. Co.* v. *Dick*, 281 U. S. 397 (1930).

(b) Under the facts of this case the forum state's contacts are insufficient to warrant depriving the Respondent of its rights under the valid foreign contract.

The Court of Appeals rejected the conclusion that *Watson* v. *Employers Liability Assur. Corp., supra*, required a different holding. The decision thus recognized the distinction between the interest of Louisiana, which sought to enable its residents to bring direct suit against an insurer of the liability of a non-resident who causes injury within the state, and which was expressed by the State of Louisiana in a well formulated statutory policy; and the interest of Florida which lacks a coherent legislative policy with respect to limitations clauses affecting the various kinds of insurance risks, both foreign and domestic. The decision below holds that the rule of *Home Ins. Co.* v. *Dick, supra*, and *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co., supra*, has not been overruled or modified. It states that *Watson* did not overrule *Delta & Pine* but distinguished it on its facts by noting that in the latter case "the activities of Mississippi, the state of the forum, in connection with the policy were so slight and so casual that Mississippi could not apply its own law in such a way as to enlarge the obligations of a contract validly created under the law of another state" (319 F. 2d at pp. 511-12). In applying the governing rule to the case at issue, the Court of Appeals correctly held that "the local contacts of Florida * * * are certainly no more, and in our view *are less*, than in the Delta & Pine case" (319 F. 2d at p. 512) (Emphasis added).

The Court of Appeals was correct in finding that Florida's interest in the case at issue was "less" than that of Mississippi in *Delta & Pine*. The Mississippi statute was specifically made applicable to insurance and declared

that it was the policy of the State to apply the statute to extraterritorial contracts governing risks within the State. Whether or not a different result may possibly be reached today in a case involving a similar Mississippi statute, the case at issue does not present a justifiable situation for reversing *Delta & Pine*, since the Florida statute involved herein lacks an affirmative expression of local policy. See *Hanson* v. *Denckla*, 375 U. S. 235, 252 (1958); *United Commercial Travelers* v. *Wolfe*, 331 U. S. 586, 612 (1947).

The absence of a sufficient expression of policy on the part of Florida to warrant outlawing short periods of limitation in foreign contracts of insurance is further demonstrated by the lack of a coherent statutory pattern in Florida with respect to suit clauses in insurance policies. Thus, Florida, by authority of its Insurance Commissioner adopted a one year suit clause in fire policies effective March 1, 1944. The Spectator, *Insurance Laws, Taxes & Fees*, p. 247 (1959); Appendix, p. 15. On the other hand, a five year limitation period would apply to the all-risks policy in issue under Florida's general statute of limitations (Fla. Stat., § 95.11(3) (1957)) if the one year suit clause is invalidated. No matter how advanced a court may be in its application of the Holmes-Brandeis doctrine that a legislature should be untrammeled by substantive due process in its legislative experimentation in the area of public welfare, the case at issue does not present a situation where the liberal view of the due process clause is apposite. Here, we are dealing with an undifferentiated blunderbuss statute enacted in 1913 at a time when regulation of insurance was in its infancy and personal property floaters were rare. Unlike the statutes involved in *Watson, Osborne* v. *Ozlin*, 310 U. S. 53 (1940); *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313 (1943); *Alaska Packers Ass'n* v. *Industrial Accident Commission*, 294 U. S. 532 (1935); and *McGee* v. *Int'l Life Ins. Co.*, 355 U. S. 220 (1957), the Statute here was adopted without regard to any policy considerations in this area of economic activity.

The validity of the decision below is also supported by the rule that a more substantial interest on the part of the forum state is required in a due process case than in a mere choice of law case. Goodrich, *Conflict of Laws*, p. 22 (3d ed. 1949), which states:

> "It should take an extraordinary case to justify an argument founded upon the public policy of the forum. This is especially true when the foreign law involved is that of another state of the United States and where the public policy of the forum is being urged to defeat a defense available under foreign law."

See also *Home Ins. Co.* v. *Dick*, *supra*, wherein the Court stated with reference to the distinction between a choice of law case and one involving deprivation of a contractual right:

> "The statute is not simply one of limitation. It does not merely fix the time in which the aid of the Texas courts may be invoked * * *. It expressly prohibits the making of certain contracts." (at 407)

The constitutional principle adopted by the Court of Appeals is also in accord with the views on the constitutional issue expressed by the Florida District Court of Appeals in the recent *Ugalde* case (*Confederation Life Ass'n* v. *Ugalde*, 151 So. 2d 315 (1963)). While the Court of Appeals recognized that the facts in *Ugalde* are dissimilar, it nevertheless did point out that the Florida court in that case applied the "significant contacts rule" in holding Florida law inapplicable to contractually created defenses valid under foreign law. The *Ugalde* opinion cites with approval the constitutional principle set forth in the first Court of Appeals opinion in this case, and in *Delta & Pine*, *supra*.

Another recent Florida decision referred to in the opinion below (*Schluter* v. *Nat'l Union Fire Ins. Co.*, 144 So. 2d 95 (Dist. Ct. App. Fla. 1962)) demonstrates the unfortunate

consequences of the application of Section 95.03 to suit clauses in foreign contracts of insurance. *Schluter* involved a loss under a foreign policy of insurance, issued to a New Jersey resident, covering liability for damage to his yacht in inland and coastal waters between Maine and Florida. By affidavit of the yacht owner's captain, the loss was declared to have occurred in Atlantic waters off the coast of Florida. Although the assured was a non-resident at the time of the loss as well as at the time the policy was issued, the suit clause contained in the valid New Jersey contract was voided by the application of Section 95.03. The court stated that it was bound by the answers given by the Florida Supreme Court in this case (133 So. 2d 735 (1961)) as to the application of Section 95.03. In *Schluter*, the constitutional issue was not raised as a bar to such application.

From the *Schluter* case it appears that Section 95.03 is to be applied by the Florida courts to all cases merely where there is jurisdiction regardless of the legitimate policy interest of Florida. The decision of the Court of Appeals in striking down a statute of this type on the basis of the protection afforded by the Constitution of the United States is in accord with the principles of law established in *Watson* and other cases in point and, we submit, furnishes no justifiable occasion for the exercise by the Court of its discretion to review the case in order to overturn the existing applicable principles of law.

POINT III

The decision below is in the public interest.

This conclusion is supported by the following factual considerations:

(a) The one-year suit clause is not a trap for the unwary but represents enlightened insurance regulation com-

pelled by the great majority of states in the administration of their insurance laws. (Appendix, p. 16, quoting N. Y. Ins. Law, § 168(6) and listing states which have adopted one year suit clauses.) The reason for compelling the insertion of one year suit clauses in insurance policies lies in the reserve requirements imposed on insurance companies whereby when a loss claim is asserted, a reserve must be set up until the claim is disposed of (Ill. Rev. Stat., ch. 73, § 1008(1)(1957)). If after the claim is filed, no suit is brought for five, or perhaps fifteen years as some states may permit (Cf. *Union Central Life Ins. Co.* v. *Barnes*, 175 Ky. 364, 194 S. W. 339 (1917)), the effect on the company's financial condition and on its other policyholders could be disastrous. Excessive premiums would have to be charged to enable a company to maintain the required reserves for such extended periods of time. Consequently, while to the uninitiated a short suit clause might appear as a trick clause inserted for the benefit of the insurer, to those engaged in insurance regulation, the clause has been regarded as a practical necessity, and insurers have been compelled to employ the clause in their approved forms of policy. The policy in issue is on an Illinois form of personal property insurance floater policy and is controlled by the provisions of the Illinois Insurance Code both as to form and as to premiums charged (Ill. Rev. Stat., ch. 73 §§ 616, Class 3(d), 755(2), 1065.22, 1065.23, 1065.34).

(b) The decision below results in a "workable rule" with respect to this class of insurance whereby a loss within the coverage of the policy may occur in any jurisdiction throughout the United States and anywhere else in the world. Mr. Justice Black in his dissenting opinion in the prior *Clay* case (363 U. S. 207 at 221), has recognized the need for a "workable rule for this country today" with respect to the regulation of the insurance business which is carried on beyond state lines. Despite the interstate character of the kind of insurance involved in personal

property floater contracts, there is no uniform state insurance statute regulating the form of policy, the premium, or the reserves to be set aside for asserted losses. However, individual states through their regulatory insurance statutes have worked out methods of control so that policies issued to assureds within their borders must conform to their requirements. Such state control is defeated if the provisions in the contract can be set aside by vague legislative precepts in any state where a loss may occur. Thus, in this case, although an Illinois premium rate was charged and the assured received all the benefits of Illinois coverage, nevertheless, as a result of the fortuitous occurrence of a loss in Florida (as was involved in *Schluter*, where the assured was a non-resident or in the instant case, where he migrated to Florida), such assureds are permitted to substitute a limitations clause in their contract which differs from that accorded other assureds who have bound themselves to observe the same contract. For such deviation to be permitted, there should be a strong local policy interest sufficient to outweigh "the workable rule" needed under our federal system as to this class of insurance.

(c) The decision below is in the public interest because this case does not involve an evasion of local regulatory laws such as is involved in the mail order cases wherein a policy is sent in from out of the state to a local assured in order to avoid control by the assured's state. *McGee* v. *Int'l Life Ins. Co.*, 355 U. S. 220 (1957). In this case, the policy was validly issued in Illinois to an Illinois resident and conformed to the law of Illinois in all respects. When the policy in suit was issued, no violation of Florida law occurred, as may be the case in mail order policies. Here, the decision of the Court of Appeals prevents the retroactive application of the Florida law to a contract which was valid in its inception in a situation where there is no legitimate local policy interest affirmatively expressed by the forum state.

POINT IV

Petitioner's objections to the decision below are in error.

(a) The Petition, at page 11, states that the Court of Appeals erroneously relied on *Confederation Life Ass'n* v. *Ugalde, supra.* In fact, the court below recognized that the *Ugalde* case involved a *Home Ins. Co.* v. *Dick* situation where there is neither residence nor the occurrence of loss in the forum state. The Court of Appeals did, however, cite the *Ugalde* case as being a recent pronouncement of the Florida courts upholding the principle announced in *Delta & Pine* and followed by the Court of Appeals in the first *Clay* case (265 F. 2d 522), requiring a justifiable interest on the part of the forum state, and not mere jurisdiction, in order for its invalidating statute to be applied to a defense available under the law of a foreign jurisdiction.

(b) The Petition, at page 7, states that the Court of Appeals disregarded the Florida Supreme Court's findings in this case with respect to the application of the Statute. The Court of Appeals did not disregard the findings of the Florida court but gave such findings an interpretation most clearly in accord with constitutionality by stating that obviously the Florida court must have required something more than mere jurisdiction for the Statute to be given invalidating effect and reached its decision on the basis of the constitutionality of applying the Statute to the facts of this case. The question certified to the Florida Supreme Court did not relate to the question of constitutionality, but only to Florida law.

(c) The Petition, at page 8, criticizes Illinois law as being more lax than the law of Florida and indicates that the insurer tried to forestall Florida law by the insertion of the suit clause. From the discussion above (pp. 8, 10-11) it is apparent that Illinois has the more coherent and integrated set of statutory regulations with respect to suit

clauses than does Florida and that when the policy was issued, the Respondent had no choice but to issue it in Illinois and in accordance with the requirements of the Illinois Insurance Code. It did not "attempt to derive the greatest possible advantage from the more lax laws of Illinois," as asserted by Petitioner.

(d) The Petition, at page 8, overlooks the distinction between "choice of law" cases and the unconstitutional deprivation of a defense. Thus, the Petition cites *Galliher v. State Mutual Life Ins. Co.*, 150 Ala. 543, 43 So. 833 (1907), and other cases which relate to choice of law to be applied rather than to due process requirements involved where a valid contractual right is at issue. This distinction was made clear above by quotations set forth at page 9, *supra*, from Goodrich, *Conflict of Laws*, and *Home Ins. Co. v. Dick*.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

1. One Year Suit Clauses:

SOURCE: CHART OF STANDARD FORMS OF FIRE INSURANCE POLICIES IN USE, CCH INS. L. REP., FIRE & CASUALTY, pp. 2003-06 (1959).

States which have adopted by statute, or by the Insurance Commissioner under authority of statute, the New York standard fire policy requiring a one year suit clause.

Alabama	Kentucky	Oklahoma
Alaska	Louisiana	Oregon
Arizona	Maryland	Pennsylvania
Arkansas	Michigan	Rhode Island
Colorado	Mississippi	South Carolina
Connecticut	Missouri	South Dakota
Delaware	Montana	Tennessee
District of Columbia	Nebraska	Utah
	Nevada	Vermont
Florida	New Hampshire	Virginia
Georgia	New Jersey	Washington
Hawaii	New Mexico	West Virginia
Idaho	New York	Wisconsin
Illinois	North Carolina	Wyoming
Iowa	Ohio	

TOTAL NUMBER:

42 States and the District of Columbia.

NOTE: In a few of the states listed the standard one year suit clause may be rendered void by decisions applying invalidating statutes to contracts issued within the state. The above list is relied upon not as being definitive of the law of any particular state, but as demonstrating that not only Illinois, but the overwhelming majority of states, do not regard the one year suit clause as an evil, but, on the contrary, require its inclusion in fire policies issued in their states.

2. The New York Insurance Law, § 168(6), which makes mandatory the one year suit clause in the New York standard fire policy provides as follows:

> "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss."

Certificate of Service

The undersigned, attorney for Respondent, certifies that a true and correct copy of the foregoing Brief for the Respondent has been served on Paschal C. Reese, Esq., 209 South Olive Avenue, West Palm Beach, Florida, attorney for Petitioner, by mailing air mail with postage prepaid, this 11th day of October, 1963.

BERT COTTON